

Farnan, District Judge.

Presently before the Court is the Motion Of Defendant, Dr. Keith Ivens, To Dismiss Plaintiff's Complaint. (D.I. 45.) For the reasons set forth below, the Court will grant the Motion.

BACKGROUND

Plaintiff is an inmate at the Delaware Correctional Center in Smyrna, Delaware. Plaintiff filed the instant 42 U.S.C. § 1983 action alleging that various acts by Correctional Medical Services ("CMS") and its employees amounted to a deliberate indifference of his medical needs, and therefore, violated his Eighth Amendment rights. In previous Memorandum Opinions and Orders, the Court dismissed Kathy English, Governor Ruth Ann Minner, CMS, and Nurse Melody Thorpe as Defendants. (D.I. 32, 39, 40, 50, 51.) By his Motion, Dr. Ivens moves the Court to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.

STANDARD OF REVIEW

A motion to dismiss tests the legal sufficiency of a complaint. Conley v. Gibson, 355 U.S. 41, 45-56 (1957). In reviewing a motion to dismiss pursuant to Rule 12(b)(6), courts "must accept as true the factual allegations in the [c]omplaint and all reasonable inferences that can be drawn therefrom." Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). A court will grant a motion to dismiss only when it

appears that a plaintiff could prove no set of facts that would entitle him or her to relief. Id.

DISCUSSION

I. Parties' Contentions

Dr. Ivens contends that the Court should grant his Motion because Plaintiff has failed to allege facts sufficient to state a claim of deliberate indifference due to Dr. Ivens's actions. At most, Dr. Ivens contends that Plaintiff has alleged facts demonstrating a disagreement among physicians over what was the appropriate medical treatment which does not rise to the level of a constitutional injury.

In response, Plaintiff contends that in his opposition brief to CMS's motion to dismiss he indicated that Dr. Ivens's treatment amounted to deliberate indifference because Dr. Ivens ignored the advice of other doctors and administered additional injections of pain medication which led to his injury. Plaintiff also contends that Dr. Ivens, as medical director of CMS, had a duty to supervise Nurse Thorpe, who ordered that Plaintiff receive increased injections of the drug Nubain. Plaintiff maintains that Nurse Thorpe's actions led to his injury, and therefore, that Dr. Ivens, as Nurse Thorpe's supervisor, was deliberately indifferent to Plaintiff's medical needs.

II. Decision

In order to successfully allege a Section 1983 action for

failure to provide medical care in violation of the Eighth Amendment, an inmate plaintiff must allege practices that violate "evolving standards of decency." Estelle v. Gamble, 429 U.S. 97, 102 (1976). Medical malpractice does not become an Eighth Amendment violation merely because the plaintiff is a prisoner. Id. at 105. Instead, the defendant's action must be said to constitute "'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" Id. at 106. To meet this standard of deliberate indifference, the defendant must know of the inmate's condition and disregard an excessive risk of the inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

In the Complaint, Plaintiff alleges that Dr. Ivens "discontinued pain medication that actually eased Plaintiff's pain," that he, along with the other Defendants, administered excessive doses of the drug Nubain, and did not perform back surgery even though such treatment was recommended by other physicians. (D.I. 2.)

The Court concludes that Plaintiff's allegations do not state a claim for failure to provide medical care in violation of the Eighth Amendment. With respect to the allegation that Dr. Ivens discontinued Plaintiff's pain medication, the Court concludes that it must grant Dr. Ivens's Motion because Plaintiff does not allege that Dr. Ivens took this action to inflict the

"unnecessary and wanton infliction of pain" or that discontinuing Plaintiff's medication amounted to a disregard of an excessive risk to his safety. Id.

Next, as the Court held in the Memorandum Opinions dated August 18, 2003, and November 20, 2003, granting CMS's and Nurse Thorpe's motions to dismiss, Plaintiff's remaining allegations regarding the decision not to perform back surgery and the administration of the drug Nubain do not state claims of deliberate indifference. See Whalen v. Correctional Medical Servs., et al., C.A. No. 02-246-JJF, 2003 WL 21994752, *2 (D. Del. Aug. 18, 2003); Whalen v. Correctional Medical Servs., et al., C.A. No. 02-246-JJF, 2003 WL 22834549, *1-2 (D. Del. Nov. 20, 2003). Accordingly, the Court will grant Dr. Ivens's Motion.

CONCLUSION

For the reasons discussed, the Court will grant Dr. Ivens's Motion to Dismiss. (D.I. 45.)

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FRANK WHALEN, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 02-246 JJF
	:	
DR. KEITH IVENS,	:	
	:	
Defendant.	:	

ORDER

At Wilmington, this 11th day of May, 2004, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that The Motion Of Defendant, Dr. Keith Ivens, To Dismiss Plaintiff's Complaint (D.I. 45) is **GRANTED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE